

**SMC Engineering and Contracting, Inc.<sup>1</sup> and International Brotherhood of Electrical Workers, Local Union 728.** Case 12-CA-18270

September 10, 1997

**ORDER DENYING MOTIONS AND REMANDING**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge and amended charge filed by the Union on August 8 and October 30, 1996, respectively, the General Counsel of the National Labor Relations Board issued a complaint on December 19, 1996, naming SMC Engineering and Construction, Inc. as the Respondent and alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Copies of the charge and amended charge were served by regular mail at the Respondent's last known business address in Hobe Sound, Florida. A copy of the complaint as first served by certified mail at this same address on December 23, 1996. The complaint was unclaimed. On February 26, 1997, the General Counsel mailed the complaint by regular mail to the same address and attached a letter notifying the Respondent that unless an answer was submitted within 14 days from the date of service, a Motion for Summary Judgment would be filed.

On April 11, 1997, the General Counsel filed with the Board a Motion to Transfer the Case to the Board and for Summary Judgment. On April 14, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

On April 28, the General Counsel filed with the Board a Motion for Leave to Amend Complaint and Amendment to Motion for Summary Judgment. In support of this motion, counsel for the General Counsel alleges that: (1) On April 21, the Postal Service returned to the Region the February 26 letter, with attached copy of the complaint, that the General Counsel had sent by regular mail to the Respondent's last known address. The envelope bearing these documents was marked "moved, left no address." (2) On April 22, the Region learned that the correct name of the Respondent is SMC Engineering and Contracting, Inc. (3) On April 22, the Region also learned of a new address in North Jupiter, Florida, for the Respondent from the Florida Division of Corporations and, on April 23, 1997, served another copy of the complaint, notice of hearing, Motion for Summary Judgment, and Notice to Show Cause on the Respondent at this North Jupiter, Florida address by certified and regular mail. There-

after, the General Counsel moved to amend the complaint to allege the proper name of the Respondent and renewed the Motion for Summary Judgment on all allegations of the complaint.

On May 1, Samuel G. DeFazio, the Respondent's president, filed with the Board a document consisting of an "Answer and Motion" and "Complaint and Motion." In the "Answer and Motion," DeFazio specifically denies, or states that he is without knowledge of, each paragraph of the complaint. In the "Complaint and Motion," DeFazio avers that the Respondent went out of business on October 10, 1996, did not thereafter conduct business at its former address, and did not receive any correspondence subsequently served there by the General Counsel. DeFazio admits receiving the documents served by the General Counsel at a new address, which DeFazio states is his personal residence, on April 25. DeFazio requests that the Board deny the General Counsel's Motion for Summary Judgment and dismiss the complaint.

On May 5, 1997, the General Counsel filed a motion to strike the Respondent's "Answer and Motion" and "Complaint and Motion." The General Counsel argues that the Respondent's response—including its answer—was untimely, inaccurate, and frivolous, and should be struck under Section 102.21 of the Board's Rules and Regulations. The General Counsel further asserts that the Respondent had accepted delivery of a subpoena duces tecum at the Hobe Sound address on November 15, 1996, notwithstanding the Respondent's argument that it had ceased operations there on October 10, 1996, and despite its claim that it had not received correspondence from General Counsel after that date. The General Counsel asserts that this establishes that the Respondent is merely attempting to circumvent the Board's procedures.

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in a complaint shall be deemed admitted if an answer is not filed (and served on the Region and the other parties) within 14 days from service of the complaint, unless good cause is shown. The December 19, 1996 complaint, and the February 26, 1997 reminder letter with complaint similarly stated that unless the Respondent filed an answer within 14 days of service, all allegations in the complaint would be considered admitted.

Here, the Respondent did not file a timely answer in response to either the original complaint or the reminder with complaint. Although the complaint and reminder were neither claimed nor received by the Respondent, this in itself would not excuse the Respondent's failure to file a timely answer. Thus, the Board has long held that a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service will not be permitted to defeat the purposes of the Act. See, e.g., *Advanced Mechanical*

<sup>1</sup> In accord with the General Counsel's motion, discussed *infra*, the caption has been amended to reflect the correct name of the Respondent.

*Corp.*, 313 NLRB 629, 629 fn. 1 (1994); *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

Notwithstanding this principle, however, we find, under the particular circumstances of this case, that the General Counsel's Motion for Summary Judgment should be denied. Thus, once the General Counsel learned in April 1997 that the Respondent had never been served with the complaint, it discovered that the Respondent's correct name differed from that listed in the complaint and the reminder letter. The General Counsel additionally obtained the address of the correctly named Respondent, which address differed from that where service earlier had been attempted. In response to this newly discovered information, the General Counsel amended the complaint to reflect the Respondent's correct name and took the additional step of serving the amended pleading (with its specified 14-day period for answering) on the Respondent. The Respondent received this amended pleading. Thereafter, within the 14-day period specified in the amended complaint, the Respondent's president filed a pro se answer denying the amended complaint allegations.

The answer that he filed is substantively sufficient to raise issues warranting a hearing.

In light of the General Counsel's actions, and in consideration of the pro se nature of the Respondent's representation, we will accept the Respondent's May 1, 1997 answer as timely. Accordingly, we deny the General Counsel's Motions for Summary Judgment and to strike the Respondent's "Answer and Motion" and "Complaint and Motion" as well as the Respondent's motion to dismiss this case and to prevent harassment of Respondent's employees. Further, we remand this case to Region 12 to schedule a hearing before an administrative law judge.

#### ORDER

It is ordered that the General Counsel's Motion for Summary Judgment, the General Counsel's Motion to Strike, and the Respondent's Motion for Summary Judgment are denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for further appropriate action.